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DECISION



Memorandum #1
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-189646

DATE: December 13, 1977

MATTER OF: Oil Country Materials of Houston, Inc.

DIGEST:

Government's alleged failure to provide protester with IFB amendments in time for protester to submit timely bid provides no basis for considering protester's late bid where 48 bidders were solicited, 9 bids were timely, and there is no indication that low bid prices were unreasonable or that contracting agency intended to preclude protester from competing.

Oil Country Materials of Houston, Inc. (Oil Country), protests the decision by the Federal Energy Administration (FEA), now the Department of Energy (DOE), that Oil Country's bid submitted in response to invitation for bids (IFB) 13-70125 was received late and could not be considered for award.

According to DOE the IFB and 3 amendments were issued to 48 bidders on the mailing list. Bid opening was scheduled for 10 a.m., May 24, 1977.

On May 16, a representative of Oil Country telephoned the FEA contract specialist in charge of the procurement and stated that Oil Country had received amendment number 3 but not the first two amendments. The FEA contract specialist suggested that Oil Country have a local Washington representative pick up the 2 amendments or arrange for their expedited delivery. Oil Country rejected this suggestion. On the same day, the contract specialist hand-carried the amendments to the post office and mailed them to Oil Country.

Oil Country's bid was received at FEA's Office of Procurement at 3:10 p.m., May 24, or after the time set for bid opening. The envelope containing Oil Country's bid had a postage meter stamp dated May 20, 1977. The bid had not been sent by registered or certified mail, and the postage stamp had not been canceled.

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Following the receipt of Oil Country's late bid, FEA conducted an investigation to determine whether the late receipt was due to Government mishandling. While the investigation did not establish the exact time the bid was received at the FEA mailroom, it produced no evidence that the late receipt of Oil Country's bid was due to Government mishandling. In fact, the procedure for handling bids for this procurement had been modified to expedite delivery of the bids to the bid opening room.

DOE states that section 1-2.303 of the Federal Procurement Regulations (FPR) (1964 ed. amend. 178) prohibits the consideration of a bid received after the time set for receipt of bids except as provided in FPR § 1-2.201 (31) (1964 ed. amend. 178), which was incorporated into the IFB in the "Instruction to Bidders." FPR reads in pertinent part as follows:

"LATE BIDS, MODIFICATIONS OF BIDS, OR WITHDRAWAL OF BIDS

"(a) Any bid received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made and either: (1) it was sent by registered or certified mail not later than the fifth calendar day prior to the date specified for the receipt of bids (e.g., a bid submitted in response to a solicitation requiring receipt of bids by the 20th of the month must have been mailed by the 15th or earlier); or

"(2) It was sent by mail (or telegram if authorized) and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation.

* * * * *

"(c) The only acceptable evidence to establish:
(1) The date of mailing of a late bid, modification, or withdrawal sent either by registered or certified mail is the U.S. Postal Service postmark on the wrapper or on the original receipt from the U.S. Postal Service. If neither postmark shows a legible date, the bid, modification, or withdrawal shall be deemed to have been mailed late. (The term 'postmark' means a printed, stamped, or otherwise placed impression that is readily identifiable without further action as having been supplied and affixed on the date of mailing by employees of the U.S. Postal Service.)"

DOE points out that since Oil Country's bid had not been sent by registered or certified mail, not later than the fifth calendar day prior to the date specified for receipt of bids, there was no acceptable evidence which established that Oil Country's bid had been mailed, nor was there any indication that its late receipt was due to mishandling by the Government after receipt at the Government installation. Accordingly, FEA had no choice but to reject Oil Country's bid.

DOE further argues that the fact that Oil Country received the first two amendments several days before bid opening provides no basis for accepting its late bid. FEA's contract specialist attempted to expedite distribution of the amendments to Oil Country, and there is no indication of any deliberate attempt to preclude Oil Country from competing. Moreover, Oil Country chose not to arrange for a more expeditious method for acquiring the amendments or for transmitting its bid.

DOE contends, alternatively, that since Oil Country did not protest the late receipt of the amendments or the time set for bid opening, an alleged impropriety in the solicitation, until after bid opening, its protest is untimely under GAO's Bid Protest Procedures, specifically 4 C.F.R. § 20.2(b)(1) (1977), which reads in part as follows:

"Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of initial proposals shall be filed prior to bid opening or the closing date for receipt of initial proposals."

According to Oil Country, it requested that FEA furnish it with copies of amendments 1 and 2 two weeks before bid opening, and at no time did FEA suggest that an Oil Country representative come to Washington to pick up the amendments. Oil Country states further that its late bid should have been considered since the requested amendments were received only 4 days prior to bid opening because of a Government delay in responding to Oil Country's request, and its bid was mailed the same day the amendments were received. The essence of Oil Country's protest is that its bid was late because of Government inaction. Oil Country does not protest the bid opening date or allege other improprieties in the IFB. Consequently, its protest is timely.

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For the reasons stated above by DOE, we agree that Oil Country's bid was late and consequently it should not have been considered. In this regard, we have held that:

"* * * where the method of solicitation in fact provided adequate competition and reasonable prices, the failure to solicit a particular bidder, or the failure to solicit him in time for him to submit a timely bid, does not, absent a showing of a deliberate intent to exclude that bidder, afford a sufficient basis to cancel a solicitation or question an otherwise proper award. 49 Comp. Gen. 707 (1970); B-155319, November 20, 1964; B-177962, March 28, 1973; cf. B-174619, March 27, 1972." B-178967, November 5, 1973.

In the instant case, 43 bidders were solicited. Nine timely bids were received, which indicates that there was adequate competition. Air Inc., B-188780, September 15, 1977, 77-2 CPD 192. There is no evidence that the low bid prices were unreasonable. Although there is a conflict in the record as to when Oil Country asked FEA to provide it with copies of amendments 1 and 2, there is no showing that FEA deliberately tried to preclude Oil Country from competing.

Based on the foregoing, the protest is denied.


Deputy Comptroller General
of the United States